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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL
COURT
11-21 February 1997

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD FROM 11 TO 21 FEBRUARY 1997

1. At its 51st meeting, on 21 February 1997, the Preparatory Committee took note of the reports of the Working Group on the Definition of Crimes (see annex I) and of the Working Group on General Principles of Criminal Law and Penalties (see annex II).

2. At the same meeting, the Preparatory Committee adopted a decision in connection with the invitation by the Government of Italy to host the diplomatic conference (see annex III).

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Annex I

REPORT OF THE WORKING GROUP ON THE DEFINITION OF CRIMES*

1. The Working Group recommends to the Preparatory Committee the text of the definition of the following crimes as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court:

Crime of genocide (A/AC.249/1997/WG.1/CRP.1 and Corr.1);

Crimes against humanity (A/AC.249/1997/WG.1/CRP.5 and Corr.1).

2. The Working Group recommends to the Preparatory Committee the text of the definition of the following crimes for further consideration at a future time:

War crimes (A/AC.249/1997/WG.1/CRP.2 and Corr.1);

Crime of aggression (A/AC.249/1997/WG.1/CRP.6 and Corr.1);

[Crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances] (A/AC.249/1997/WG.1/CRP.4 and Corr.1).

* Incorporating the documents listed in paras. 1 and 2 of the report.

Crime of genocide

For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent[1] to destroy, in whole or in part, a national, ethnical, racial or religious group,[2] as such:[3]

(a) Killing members of the group;

(b) Causing serious bodily or mental harm[4] to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group;

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[1] The reference to "intent to destroy, in whole or in part ... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.

[2] The Working Group took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity.

[3] The Working Group noted that with respect to the interpretation and application of the provisions concerning the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law.

In this regard, the Working Group noted that for purposes of interpreting the present article it may be necessary to consider other relevant provisions contained in the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other sources of international law. For example, article I would determine the question of whether the crime of genocide set forth in the present article could be committed in time of peace or in time of war.

Furthermore, article IV would determine the question of whether persons committing genocide or other acts enumerated in the present article [article III of the Genocide Convention] shall be punished irrespective of their status as constitutionally responsible rulers, public officials or private individuals.

The interrelationship between the various articles of the present Statute would need to be examined in the next phase of the work. For example, the matters dealt with in the first to third paragraphs of the present note would need to be considered in relation to article 33 (Applicable law) of the Statute and the provisions dealing with principles of criminal law.

[4] The reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties.

[The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.][5]

Crimes against humanity

1. For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population]:

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];[6]

(f) torture;

(g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other

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[5] The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on general principles of criminal law has considered this issue in the context of its work.

[6] It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.

similar] grounds[7] [and in connection with other crimes within the jurisdiction of the Court];

(i) enforced disappearance of persons;[8]

(j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.[9]

[2. For the purpose of paragraph 1:

(a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

(b) "deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

(c) ["torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]

["torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]

["enforced disappearance of persons" as defined in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994, as referred to

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[7] This also includes, for example, social, economic and mental or physical disability grounds.

[8] It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.

[9] It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.

in the Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly resolution 47/133 of 18 December 1992)].

War crimes

[For the purpose of the present Statute, "war crimes" means:]

[For the purpose of the present Statute, any of the following war crimes constitutes a crime within the jurisdiction of the court when committed as part of a systematic plan or policy or as part of a large-scale commission of such crimes:]

A. grave breaches of the Geneva Conventions of 12 August 1949, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) [wilfully causing great suffering, or serious injury to body or health] [wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity];

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

B. [Other war crimes in violation of the laws and customs applicable in international armed conflict within the established framework of international law, namely:]

[Other war crimes in international armed conflict][10]

[other grave breaches]

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[10] Other delegations feel that grave breaches of Protocol Additional I to the 1949 Geneva Conventions should be reflected in the Statute under the heading of grave breaches which would reflect more appropriately the status of those crimes in international humanitarian law.

[[11] 1. [Any of the following acts, when committed wilfully, in violation of international humanitarian law, and causing death or serious injury to body or health:[12]]

[Grave breaches of article 85(3) of Protocol I of 10 June 1977 Additional to the Geneva Conventions of 12 August 1949, namely the following acts, when committed wilfully, in violation of the relevant provisions of the Protocol and causing death or serious injury to body or health:]

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects[;[13]] [, which is excessive in relation to the concrete and direct military advantage anticipated;]

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects[;[14]] [, which is excessive in relation to the concrete and direct military advantage anticipated]

(d) [making non-defended localities and demilitarized zones the object of attack;]

[attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended[15];]

(e) [making a person the object of attack in the knowledge that he is *hors de combat;]*

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[11] This square bracket closes after paragraph 3 (c).

[12] The provisions of paragraph 1 are drawn from article 85(3) of Protocol Additional I to the 1949 Geneva Conventions.

It was suggested that crimes listed under section B (1)-(3) could be covered as treaty crimes.

[13] This provision should be read together with article 57(2)(a)(iii) of Protocol Additional I to the 1949 Geneva Conventions. This footnote is an alternative to the words in square brackets following it.

[14] This provision should be read together with article 57(2)(a)(iii) of Protocol Additional I to the 1949 Geneva Conventions. This footnote is an alternative to the words in square brackets following it.

[15] This alternative is drawn from article 25 of the Annex to the IV Hague Convention respecting the laws and customs of war on land.

[killing or wounding an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion[16];]

(f) the perfidious use of the distinctive emblem of the red cross or red crescent or of other protective signs and signals recognized by international humanitarian law.[17]

2. [Any of the following acts, when committed wilfully and in violation of international humanitarian law:[18]]

[Grave breaches of article 85(4) of Protocol I of 10 June 1977 Additional to the Geneva Conventions of 12 August 1949, namely the following acts when committed wilfully, in violation of the relevant provisions of the Protocol and causing death or serious injury to body or health:]

(a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;[19]

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) [making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result, extensive destruction thereof, where there is no evidence of the use by adverse party of such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives]

[intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places

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[16] This alternative is drawn from article 23.1(c) of the Annex to the IV Hague Convention respecting the laws and customs of war on land.

[17] This provision should be read together with article 37 of Protocol Additional I to the 1949 Geneva Conventions. It is partly overlapping with a proposal in 4(d) below.

[18] The provisions of paragraph 2 are drawn from article 85(4) of Protocol Additional I to the 1949 Geneva Conventions.

[19] This provision should be read together with article 49 of the Fourth Geneva Convention.

where the sick and wounded are collected, unless such property is used in support of the military effort[20]];

3. [Wilful acts or omissions, in violation of international humanitarian law, which seriously endangers the physical or mental health or integrity:[21]]

[Grave breaches of article 11 of Protocol I of 10 June 1977 Additional to the Geneva Conventions of 12 August 1949, namely the following acts, when committed wilfully, in violation of the relevant provisions of the Protocol and causing death or serious injury to body or health:]

subjecting persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty, to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty, in particular to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

(c) removal of tissue or organs for transplantation.]

4.[22] [Other serious violations of international humanitarian law.]

(a) killing or wounding treacherously individuals belonging to the hostile nation or army [perfidy[23]];

(b) killing or wounding an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;[24]

(c) [declaring that no quarter will be given [thereby inflicting death or serious personal injury upon the enemy]]

[to declare that there shall be no survivors];

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[20] This alternative is based on article 27 of the Annex to the IV Hague Convention respecting the laws and customs of war on land.

[21] The provisions of paragraph 3 are based on article 11 of Protocol Additional I to the 1949 Geneva Conventions.

[22] The numbering of this paragraph depends on the inclusion of paragraphs 1-3 above.

[23] This alternative provision should be read together with article 37 of Protocol Additional I to the 1949 Geneva Conventions.

[24] This has also been covered in paragraph B.1(e).

(d) [making improper use of flag of truce of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive emblems of the Geneva Conventions, [thereby inflicting death or serious personal injury upon the enemy]]

[perfidy];

(e) destroying or seizing the enemy's property [, within one's custody or control,] unless such destruction or seizure be imperatively demanded by the necessities of war;[25]

(f) [declaring] abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(g) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(h) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;[26]

(i) [pillaging a town or place, even when taken by assault]

[pillage]

[plunder];

(j) employing poison or poisoned weapons;[27]

[(k) [employing weapons, projectiles and material and methods of warfare of such a nature as to cause superfluous injury or unnecessary suffering [or inherently indiscriminate] [:][including:]]

[employing arms, projectiles, or material calculated to cause unnecessary suffering [:][including:]]

(i) using asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(ii) using bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

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[25] This subparagraph is drawn from article 23.1(g) of the Annex to the IV Hague Convention respecting the laws and customs of war on land.

[26] This has also been covered in paragraph B.1(d).

[27] It was suggested that this subparagraph could be moved to subparagraph (k).

(iii) using bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;

(iv) using chemical weapons [as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;] in violation of international law;[28]

(v) [using or the threat of use of nuclear weapons]]

(l) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, unless such property is used in support of the military effort;[29]

(m) intentionally directing attacks against the civilian population as such, as well as individual civilians;

(n) outrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity;

(o) utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces, which otherwise would be legitimate military objectives, immune from military operations;

[(p) to cause wilfully, widespread, long-term and severe damage to the natural environment;

(q) attacks against buildings, material medical units and transport and personnel entitled to use in conformity with international humanitarian law, the distinctive emblem of the red cross or the red crescent;

(r) starvation of civilians;

(s) to recruit children under the age of fifteen years in the armed forces, or to allow them to take part in hostilities;

(t) violation of armistice, suspensions of fire or local arrangements concluded for the removal, exchange and transport of the wounded and the dead left on the battlefield.]

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[28] This provision should be read together with the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction.

[29] This has also been covered in paragraph B.2(d).

[[30] C. [...]

1. Serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 in the case of an armed conflict not of an international character namely the following acts against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(a) [violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment]

[violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture];

(b) taking of hostages;

(c) [outrages upon personal dignity, in particular humiliating and degrading treatment [rape and enforced prostitution];]

[outrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity;]

[wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity];

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by regularly constituted court affording all judicial guarantees which are generally recognized as indispensable;

2.[31] [Other war crimes in non-international armed conflicts

(e) collective punishments;

(f) acts of terrorism;

(g) slavery and the slave trade in all their forms;

(h) [pillaging a town or place, even when taken by assault;]

[pillage;]

[plunder;]

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[30] This square bracket closes at the end of section C.

[31] This square bracket closes after the last paragraph of the section.

(i) attacks directed against the civilian population as such, or individual civilians;

(j) employing poison or poisoned weapons;

[(k) [employing weapons, projectiles and material and methods of warfare of such a nature as to cause superfluous injury or unnecessary suffering [:][including:]]

[employing arms, projectiles, or material calculated to cause unnecessary suffering [or inherently indiscriminate] [:][including:]]

[(i) using asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(ii) using bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(iii) using bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;

(iv) using chemical weapons [as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;] [in violation of international law;[32]]]

(l) to cause wilfully widespread, long-term and severe damage to the natural environment;

(m) attacks against buildings, material, medical units and transports, and personnel entitled to use in conformity with international humanitarian law, the distinctive emblem of the red cross or red crescent;

(n) attacks directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort;

(o) starvation of civilians;

(p) to recruit children under the age of fifteen years in the armed forces, or to allow them to take part in hostilities;

(q) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or military reasons so demand;

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[32] This provision should be read together with the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction.

(r) perfidy;

(s) [declaring that no quarter will be given [thereby inflicting death or serious personal injury upon the enemy]]

[declaring that there shall be no survivors];

(t) violation of armistice, suspensions of fire or local arrangements concluded for the removal, exchange and transport of the wounded and the dead left on the battlefield.]]

[[33] Crime of aggression[34]

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 23 of the ILC draft statute.

1. [For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

(a) planning,

(b) preparing,

(c) ordering,

(d) initiating, or

(e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

[For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed

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[33] This square bracket closes at the end of paragraph 2.

[34] The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the statute.

The Working Group considered this crime without prejudice to a final decision on its inclusion in the statute.

force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:][35]

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

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[35] Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

[Crimes of terrorism[36]

The Court has jurisdiction with respect to the following terrorist crimes:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel[37]

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

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[36] The Working Group considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the statute. The Working Group also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.

[37] Ibid.

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

[Crimes involving the illicit traffic in narcotic drugs and psychotropic substances][15]

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[15] Ibid.

Annex II

REPORT OF THE WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW AND PENALTIES*

1. The Working Group recommends to the Preparatory Committee the text of the following articles concerning general principles of criminal law as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court.

Nullum crimen sine lege (A/AC.249/1997/WG.2/CRP.1);

Non-retroactivity (A/AC.249/1997/WG.2/CRP.1);

Individual criminal responsibility (Personal jurisdiction) (A/AC.249/1997/WG.2/CRP.2);

Irrelevance of official position (A/AC.249/1997/WG.2/CRP.2/Add.1);

Individual criminal responsibility (A/AC.249/1997/WG.2/CRP.2/Add.2);

Command responsibility (A/AC.249/1997/WG.2/CRP.3);

Mens rea (Mental elements of crime) (A/AC.249/1997/WG.2/CRP.4);

Actus reus (act and/or omission) (A/AC.249/1997/WG.2/CRP.5);

Mistake of fact or of law (A/AC.249/1997/WG.2/CRP.6);

Age of responsibility (report of the Preparatory Committee,[1] part 3 bis, article E);

Statute of limitations (report of the Preparatory Committee,[2] part 3 bis, article F).

2. The Working Group did not have time to consider articles L to T, contained in part 3 bis of the report of the Preparatory Committee,[3] nor section 2 thereof, nor the question of penalties.[4]

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* Incorporating the documents listed in paragraph 1 of the report.

[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 22A (A/51/22), vol. II.

[2] Ibid.

[3] Ibid.

[4] Ibid., part 5.

Article A[5]

Nullum crimen sine lege

1. Provided that this Statute is applicable in accordance with article [21, 22 or 23] a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in articles [20 (a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article [20 (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

3. Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

Article A bis

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article A, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][6]

Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session

[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the

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[5] The letter designation of the articles contained in the present annex correspond to those found in part 3 bis (General principles of criminal law) of volume II of the report of the Preparatory Committee.

[6] This provision raises issues relating to non-retroactivity, amendment of the statute and penalties. Accordingly, further consideration of this issue is required.

Court has jurisdiction in respect of the acts that it specifies in the declaration.

The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]

[The present Statute shall apply only to acts committed in the territory of a State party to the present Statute or by the nationals of a State party to the present Statute or against the nationals of a State party to the present Statute.]

Article B a.

Individual criminal responsibility

a. Personal jurisdiction

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][7]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

[7] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

6. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][8]

Article B b., c. and d.

Individual criminal responsibility

[Subject to the provisions of articles C, G and H,] a person is criminally responsible and liable for punishment for a crime defined [in article 20] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article __ [referring to command/superior responsibility];]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[9]

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

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[8] There is a deep divergence of views as to the advisability of including criminal responsibility of juridical persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of juridical persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of juridical persons, hold the view that this expression should be extended to organizations lacking legal status. Some prefer the term "legal entities".

[9] It was pointed out that the commentary to the ILC draft Code of Crimes (Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the ICC. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];[10]][11]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[12] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[13]

Article B e.

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.[14]

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[10] In addition to the two types of conduct described in para. (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[11] The inclusion of this subparagraph gave rise to divergent views.

[12] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with defences or penalties.

[13] A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

[14] Further discussion of paragraph 2 would be required in connection with procedure as well as international judicial cooperation.

Article C

Command responsibility[15]

Responsibility of [commanders] [superiors][16] for acts of [forces under their command] [subordinates]

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility][17] for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) the [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(b) the [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].

Article E

Age of responsibility

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time.]

2. [A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute.]

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[15] One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.

[16] Most delegations were in favour of extending the principle of command responsibility to any superior.

[17] The alternatives highlight the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.

Proposal 2

Age of persons liable to punishment

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute.]

[Note. Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.

It was observed that, in its article 1, the Convention on the Rights of the Child defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.]

Article F

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal].]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in article 27 (a), (b) and (c)[18] shall not be subject to limitation.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 27 (d) and (e)[19] shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

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[18] Paragraphs (a), (b) and (c) of article 27 deal, respectively, with the crime of genocide, crimes against humanity and the crime of aggression.

[19] Paragraphs (d) and (e) of article 27 deal, respectively, with serious violations of the laws and customs applicable in armed conflicts and with grave breaches of the four 1949 Geneva Conventions and of article 3 common to the four 1949 Geneva Conventions.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) in case of instantaneous crime, from the moment of its perpetration;

(b) in case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) in case of permanent crime, from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

Article G

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute[20] to avoid the result of such

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[20] Some delegations questioned whether the source of this obligation is wider than the statute.

crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[21]

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][22]

Article H

Mens rea

Mental elements of crime

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent and knowledge.

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) in relation to conduct, that person means to engage in the act or omission;

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.

[4.[23] [24] [25] For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

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[21] Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

[22] Some delegations thought that a provision on causation was not necessary.

[23] Further discussion is needed on this paragraph.

[24] The need for this paragraph will be re-examined once a decision has been taken on the definition of crimes.

[25] A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the statute.

(a) the person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) the person is aware that the risk is highly unreasonable to take;

[and]

[(c) the person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]]

Article K

Mistake of fact or of law[26] [27]

Alternative text A

Unavoidable mistake of fact or of law shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment.

Alternative text B

1. A mistake of fact shall be a defence only if it negates the mental element required by the crime [charged provided that said mistake is not inconsistent with the nature of the crime or its elements] [, and provided that the circumstances he reasonably believed to be true would have been lawful].

2. Mistake of law may not be cited as a ground for exemption from criminal responsibility [, except where specifically provided for in this Statute].[28]

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[26] There were widely divergent views on this matter.

[27] Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.

[28] Some delegations felt that paragraph 2 of alternative text B still left some ambiguity, and an alternative approach could read as follows:

> "Mistake of law as to whether a particular type of conduct is a crime under this Statute, or whether a crime is within the jurisdiction of the Court, is not a defence. However, a [reasonable] mistake of law may be a defence if it negates the mental element required by such crime."

Annex III

DECISION ADOPTED BY THE PREPARATORY COMMITTEE IN CONNECTION WITH THE INVITATION BY THE GOVERNMENT OF ITALY TO HOST THE DIPLOMATIC CONFERENCE

At its 51st meeting, on 21 February 1997, the Preparatory Committee adopted the following decision:

"The Preparatory Committee on the Establishment of an International Criminal Court,

"Welcomes the proposal by the Government of Italy to hold the diplomatic conference in Rome; and

"Recommends to the General Assembly that, pursuant to General Assembly resolution 51/207 of 17 December 1996, after consideration by the Committee on Conferences, a decision in accordance with such proposal be made when dealing with the necessary arrangements for the conference, on the understanding that the organization of the conference in Rome will proceed on the basis of the usual practice concerning the funding of events of this kind taking place outside United Nations Headquarters or other United Nations seats."